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Daphne Rozenblatt*

Introduction: Criminal Law and Emotions in Modern Europe

With an Introductory Note on Images of Legal Feeling

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Daphne Rozenblatt

Introduction: Criminal Law and Emotions in Modern Europe

With an Introductory Note on Images of Legal Feeling*

Guilt: no other word attests more forcefully to the interrelationship between criminal law and emotions. In a criminal court, the guilty have been deemed culpable of specific offenses; at the same time, feelings of guilt or expressions of atonement can affect such verdicts and their consequences. To be »found guilty« is to be reassigned a state of being, a practice formalized by and emblematic of criminal law, including the institutions, personnel, and practices involved in prosecuting and punishing violations of penal code that result in the injury of people or property. The consequences for the guilty and others involved in a trial are legal, material, social, and emotional. But whereas the significance of the legal, material, and social are broadly accepted in historical analysis, the role of emotions has been a matter of debate. The epistemic question underlying such disputes is emblematic of the history of emotions as a whole: are emotions actual mechanisms of change or merely symptomatic of other, more fundamental motors of history? Are they structuring elements or ancillary to history's design? Setting aside the complexity of its popular and legal meaning and the difficulties of translation across different languages, cultures, and traditions, »guilt« captures how the formalized practices and rituals of criminal law exercise power over and through feeling. The state authority's dominance through judgement and punishment in criminal courts as well as the porosity of its walls to the opinions and reactions to those indirectly affected by a case – in other words, the legal and political social structures peculiar to criminal law – form historically specific constellations of legal feeling.

Lucien Febvre first highlighted the historical relationship between law and sensibility in 1941.[1] In an article since proclaimed to be a harbinger of the modern history of emotions, Febvre not only offered a theory of how emotions related to society in history and a parry against the retroactive psychologizing of historical actors, he proclaimed the history of affective life to have existential importance to the endeavor of history as whole.[2] The historian could not desert the »extremely attractive« and »frightfully difficult« task of reconstituting historical sensibilities without becoming an »accomplice« to an anecdotal history dominated by »intuitive imagination«.[3] Without ignoring their organic substrate or individual psychological manifestations, Febvre argued that emotions constituted a »system of inter-individual stimuli« and that regulating emotions conferred on the group »greater security and greater power … [justifying] the constitution of a veritable system of emotions«. Emotions became »a sort of institution«.[4] Consider Febvre's example of the king who intervenes to save the criminal whose head lays ready on a chopping block:

> But why should there be any question of grace rather than death? Might it be that after a close study of the facts and merits of the case some doubt still existed? Not at all. It is our form of justice that weighs the facts again and again, hesitates, feels its way and gauges carefully. And

* This Focus section represents some of the historical research conducted by members of the law-and-emotions group convened by Ute Frevert at the Center for the History of Emotions at the Max Planck Institute for Human Development. I would like to extend particular thanks to Stephen Cummins for his comments and input during the writing of this introduction. I would like to express my further gratitude to the law-and-emotions group as well as to the editors of *Rechtsgeschichte – Legal History*.

1 Febvre (1941). Translation in Febvre (1973).

2 Recent discussions of the history of emotions include: Rosenwein (2010); Plamper (2012/2015); Matt / Stearns (2013); Rosenwein (2016). On history of emotions and law, see Bailey / Knight (2017); Kounine (2017).

3 Febvre (1973) 12, 19.

4 Cited in Febvre (1973) 25.

> what of the justice of the sixteenth century? *All* or *Nothing*. And when justice has pronounced *All* or *Nothing* the king can intervene. To narrow down and gauge the decision? Not at all … The [people] are just as content with the gift of grace if it falls on a criminal as if it falls on someone truly to be pitied … What counts is something quite separate from attenuating circumstances and the balance of the books. What counts is *Pity* as such. The *gift* which is a *pure gift*. Grace which is *pure grace*.[5]

In the sixteenth-century criminal justice that Febvre described, the king's mercy, pity, or grace was judicially more powerful and accepted than fairness. The king's authority over social emotions had the ability to (arbitrarily) save a life. For Febvre, the history of emotions began in the legal archives with »documents on moral conduct«.[6]

Since Febvre, contemporary historical research into law and what became the catch-all of »emotions« has two genealogies. First, pioneers of social history from the 1970s and 80s found legal documents to be rich sources in reconstructing the everyday lives and mentalities of history's forgotten: the poor, lower classes, and women. For the (usually early modern) historian, legal records were either a means to an end (discovering how people lived their lives or how their »selves« were produced),[7] or ends in themselves (exploring how legal systems shaped or responded to the persons subject to legal procedure).[8] But as sources, legal documents can be taken to »produce and reflect institutional – societal, religious, political – values and discourses« or also to »shed light on how people experienced the law and thus provide more nuanced readings of the texture of everyday lives and realities«.[9] For social historians concerned with feeling, the question is whether the methodologies developed by the history of emotions help in grappling with such interpretations.[10] For example, Stephen Cummins's article in this Focus section analyzes the socio-emotional experience of the law, exploring how emotions were both instruments and objects of legal negotiation, partaking in the expansion of legal arbitration and contributing to the reconceptualization of emotions within the law.

Second, interdisciplinary emotions research has also spurred the re-evaluation of law's inner workings in relation to broader social, political, and cultural trends. Legal theorists have not only proven the existence of emotions in every facet of the law, they have also shown that emotions shape legal theory, practice, and actors. They argue that emotions have always been both the subject and substance of law – a claim hard-fought against a bastion of legal scholarship in which law is still the preserve of reason. More expressly, crimes of passion demonstrate the way in which legal codes define and punish according to emotions, for instance, and the enactment of emotions in the court proves a longstanding and multifaceted legal practice. The research of legal scholars and theorists such as Susan Bandes, Terry Maroney, and Martha Nussbaum has ranged from the descriptive (categorizing and analyzing the ways in which emotions affect law) to the prescriptive (debating the ways in which emotions *should* affect law).[11] For historians, their claims are both theoretically provocative and methodologically applicable, which has led to research on the emotionalism and passions of the law, the historical currency of forgiveness, disgust, and shame within its institutions, the role of victimhood or revenge within criminal procedure, and the changes in legal actors as an emotional type. Both Pavel Vasilyev and Gian Marco Vidor's contributions to this Focus section explore the emotional practices and norms of judges and lawyers, respectively. Drawing on the work of Terry Maroney, these two articles explore the emotions of changing – or seemingly unchanging – legal actors through the emotional practices they »performed« in addition to what they felt.[12]

Recent historical collections on law and emotions have engaged with both these research agendas. Highlighting the relationship between law and emotional concepts, Dagmar Ellerbrock and Sylvia Kesper-Biermann have responded to legal studies by calling for a systematic approach to the

5 Febvre (1973) 17–18.
6 Febvre (1973) 24.
7 See, for example, Davis (1983); Ginzburg (1980).
8 See, for example, Smail (2003).
9 Kounine (2017) 3.
10 For a more extended discussion of the history of emotions, law, the self, and social history, see Kounine (2017).
11 See, for example, Bandes (1999); Nussbaum (2004); Maroney (2006).
12 To draw on Monique Scheer's language (2012).

»genesis of law out of emotion«, the role of theories of emotions on legal norms, legal decision-making, judicial procedures and institutions, and the role of emotions in shaping public perceptions of the law.[13] Merridee L. Bailey and Kimberley-Joy Knight have instead called for the systematic analysis of the »rhetorical force of emotions and their implications for law's emotional character«. With special attention to language and the blurred line between the legal and extra-legal, they ask not only »whether or in what ways emotions [were] present in courtrooms« but also »how important they were in comparison with other factors«.[14] Focusing on the body and emotional practices, Laura Kounine has argued for the examination of emotions in legal documents beyond words. In her approach, legal documents can give historians insight into »emotions not just as inchoate feelings but as bodily practices that are cultural and historically situated«.[15] Concepts, rhetoric and practices all contribute to the historical understanding of the interrelationship between law and emotions, situating this process more often than not within the courtroom or in connection to specific legal battles or codes. These approaches have been complemented by scholarship outside the European context in literary studies and a growing body of legal-theory manifestos.[16]

The approaches of recent law and emotions scholarship probe the interrelations between social, intellectual, and emotional life within legal institutions, but Febvre's reflections on the simultaneity and control of emotions in social groups and the security and power those emotions conferred – as they pertain to the law – remain. While many of his assumptions about emotions and psychology have been revised, critiqued, and historicized,[17] the relationship Febvre discerned between social institutions and the power of emotions has been developed and refined by some of the pioneers of emotions history.[18] Social historians who have explored the power of the law to shape emotion have posited as much, contributing to the socio-legal theorizing of emotions that – as Cummins points out – dates back at least to the work of Montesquieu. At the same time, they chipped away at the institutional durability in this argument, often critiquing the civilizational arguments of Norbert Elias as well as macro-level modernization theories through micro-level analysis. Daniel Lord Smail, for example, investigated how judicial practices developed in thirteenth- and fourteenth-century Marseilles, and how »consumers« of justice increasingly turned to legal authorities in order to arbitrate private disputes and social hatred;[19] John Bossy explored how legal institutions forged and enforced processes of peacemaking as a »moral tradition« in post-Reformation Europe;[20] and David Warren Sabean demonstrated how the state's legal authorities intervened in incidences of dispute in early modern German villages, often reconfiguring alliances, family relations, and social sympathies and rivalries.[21] Vengeance and the law and codes of honor are additional subjects that have allowed historians to examine how the law shaped human feeling at different scales through negotiation, exchange, in contest or, just as often, in cooperation with popular culture.[22]

These interpretations of the legal shaping of emotions require consideration of a multilateral flow of social demands, pressures, and rewards as well as the permeability of law's rigid rules and standards and the flexibility of its resilient traditions, or – as Vasilyev captures – its radical change. Whereas Michel Foucault's theories regarding the institutional shaping of the modern soul have probably influenced most historians of European legal practices and cultures either explicitly in or implicitly,[23] many came to resist his portrayal of pervasive institutional power and the top-down approach he shared with social theorists of modernity. The articles of this Focus section consider how emotions and emotionality (here referring to emotional character, disposition, or behavior[24]) were not only shaped by, but also shaped legal institutions. They explore the norms, technologies, persons and practices that define and are defined by

13 Ellerbrock / Kesper-Biermann (2015) 6–9.
14 Bailey / Knight (2017) 128.
15 Kounine (2017) 3.
16 See Sellers (2014); Grossi (2015); Johnson (2015); Kim (2015); Conway / Stannard (2016); Maroney (2016); West (2016).
17 See Rosenwein (2002); Dixon (2011).
18 See Stearns / Stearns (1985); Reddy (2001).
19 Smail (2003).
20 Bossy (1983).
21 Sabean (1984).
22 A few examples include Smail (1997); Spierenburg (2008); Goldberg (2010); Frevert (2011); Frevert (2014).
23 Foucault (1975). See also Turkel (1990); Golder / Fitzpatrick (2010); Golder (2013).
24 »emotionality« (2011).

emotions in law, and thus how emotions were arbitrated, codified, judged, punished, rewarded and interacted with criminal law in Europe from the 16th to the 20th century. This research highlights the way that criminal law is permeated by social, cultural, and political systems, and within this plurality of frameworks, it analyzes emotions according to their specific historical dynamics. The courtroom is often the beginning point for law-and-emotions research, but this Focus section takes this theme deeper and further in both the macro- and micro-historical sense, including two articles that focus on changes in penal code, victimhood and reparation, and insanity and responsibility, as well as two articles that focus on legal figures whose emotions were shaped by legal practices.

The section begins with Stephen Cummins's contribution, *Negotiating Justice and Passion in European Legal Cultures, ca. 1500-1800*, which explores the »emotional dynamics of negotiated justice«. Focusing on Italian sources, he explores how increased litigation in the early modern period often aimed at peace-making but also generated (or sustained) hatred. But litigation could also be an extremely emotional affair and included emotional practices that were verbal and gestural. Forgiveness, reconciliation, pity, and reparations evolved as a way of quelling passions and reshaping social feeling. However, legal interventions were not necessarily successful. Thereafter, eighteenth-century criminal law shifted its emotional aims, when laws became »reconsidered as tools to channel human passions in certain directions«. Early modern practices of litigating feeling are echoed, though not necessarily comparable, with late-twentieth and twenty-first century victim impact statements, which have injected »controversial« emotional practices into the court. My own contribution, *Legal Insanity: Towards an Understanding of Free Will Through Feeling in Modern Europe* examines the way that changing notions of medical insanity contended with its legal definition, transforming emotions from descriptions to symptoms of mental illness, and hence becoming the center of new debates about legal responsibility and free will. Utilizing English and Italian medical jurisprudence handbooks during the long nineteenth century, the article explores how insanity became emotionalized in medical science in both the continental and British contexts, triggering both a change in legal discussions of insanity, while at the same time preserving the law's definition of insanity based on reason. The article looks at emotions at the crossroads of two systems of knowledge and practice whose notions of proof, definitions of madness, and professed claims led to conflicts and cooperation that revised and disseminated new notions of feeling in criminal law.

Moving to the early twentieth century, Pavel Vasilyev's *Beyond Dispassion: Emotions and Judicial Decision-Making in Modern Europe* examines how norms about emotions changed for judges in revolutionary Russia. Building on the work of Terry Maroney, he examines how judges were first fashioned into dispassionate legal actors and later refashioned into jurists of emotions. Specifically, Vasilyev connects the radical shift in judiciary ideals to legal and cultural movements further west and the German Free Law movement. In this revolutionary moment, emotions of defendants and those subject to the law could significantly influence a trial outcome. Furthermore, the ideal of the judge changed: passion displaced dispassion, and revolutionary justices stressed the »moral origins of the law and even proposed to consider the law as a kind of emotion itself«. Whereas the emotional reconceptualization of the law and legal actors after the Russian Revolution of 1917 was, in effect, a short-lived moment, it grew out of long-standing European legal traditions and finds parallels in contemporary legal scholarship's return to emotions as a valid and even desirable component of legal practice. Lastly, Gian Marco Vidor's *Rhetorical Engineering of Emotions in the Courtroom: the Case of Lawyers in Modern France* examines the emotional norms and performances of the lawyers' courtroom speeches. Spanning the nineteenth and twentieth centuries, he shows how what first appeared to be a static legal tradition of emotional courtroom rhetoric was maintained and developed through specific legal conventions. France was both exemplary and exceptional of this trend, sharing legal traditions with its neighbors while producing a significant number of texts in which lawyers debated the role of emotions in their practices. Legal education and the training of lawyers in the rhetorical tradition of Cicero enforced emotional norms for courtroom performance over time. At the same time, the specificities of the courtroom changed how lawyers would appeal to feeling, and led to the muting of emotional performance. In this detailed look at emotional practices, Vidor explores notions of authenticity, interaction, and theatricality in lawyers' speeches.

The claim that law shapes emotions has different implications for the historian than it does for contemporary scholars interested in the law. For legal scholars, acknowledging law as a shaping force of human sentiment can also imply the responsibility of legal systems for their positive or negative social and emotional effects. In her discussion of »the emotions that law itself generates«, legal philosopher Robin West evocatively described law as creating »the material and psychic conditions of our lives within which healthy and life sustaining emotions will take root, will develop, or will die«, for »it is not only bad economic conditions, or poverty, or culture, or the breakdown of family, or the absence of fathers, creating the emotional ill health behind social pathologies. Our substantive law … is complicit«.[25] To explore legal emotions, however, the law's traditional conceptualizations of emotions will not do.[26] Instead, doing so demands an »interdisciplinariness« that, to quote Maroney, »requires discipline«.[27] Psychologists have also turned their attention to law and emotions, offering their extensive research as a handmaiden to justice and partaking in a strained cross-disciplinary discussion of unequal institutional power. For example, research on the notions of justice jurors apply in making decisions regardless of judges' instructions suggests a path to legal reform through scientific evidence.[28] Other discussions target law's emotion-making capacities. Lisa Feldman Barrett affirms that »[t]he ultimate rules for emotion in any society are set by its legal system«. Law relies on the idea of choice, and choice confers responsibility, but the law's artificial differentiation between reason and emotion has no basis in scientific knowledge.[29] Applying psychological constructionism of emotions to the law shows how context and emotional concepts create legal experiences of reason and objectivity. Such theoretical insights would demand that jurists concede the illusory nature of reason and objectivity, for judges and jurors »necessarily suffer from affective realism«, »how their feelings literally alter what they see and hear in court«.[30]

Such discussions reflect the similar concerns but different priorities of scholars of law and emotion. They also demonstrate an increasing interest in the historical approach to knowledge across disciplines, particularly the centrality of context and the difficulties of weighing with the scales of time. For example, that contemporary legal-scientific debates about emotions in the law closely resemble those of the long nineteenth century not only shows the endurance of a debate continuing for over a century, they also reflect the significance of historical law-and-emotions research to contemporary debates. While such scientific and legal debates show that »relevance« does not always lead to the desired »reform«, they also reveal how historicizing the formation of emotion as a scientific and legal object can lead to a more fruitful and nuanced debate.

Images of Legal Feeling

Justice has not always been blind. Embodied as a woman carrying a scale and sword, her eyes were covered in the sixteenth century when the blindfold's critical implications were transformed into positive attributes of neutrality and equality. The law was to be based on texts, not the »dazzlement« of images.[31] But the blindfold not only symbolized the aspirations of modern European legal systems toward impartiality, it also acknowledged the power of the visual in shaping opinions, judgments, and prejudices. In contrast to language, scholars have argued, images have a sensual and often aesthetic power that runs counter to the purported ideals of the law as cool and rational, based on »reason and necessity«.[32] The law metaphorically renounces vision in order to preserve its principles, and bureaucracy has been held to be the practical means of this renunciation. As one scholar pointedly stated, »Procedure is the blindfold of Justice«.[33]

While the eponymous goddess embodying unfeeling fairness is perhaps its best-known representation, other images of justice attest to its emotions. Those selected for this Focus section of *Rechtsgeschichte – Legal History* represent some of the ways in which emotions appear in depictions of

25 West (2016) 342, 360.
26 For a discussion of juridical perspectives, see Sellers (2014).
27 Maroney (2016) 6.
28 Finkel / Parrott (2006).
29 Barrett (2017) 219–221.
30 Barrett (2017) 247, 249.
31 Jay (1999) 24. See also Resnik / Curtis (2015).
32 Douzinas / Nead (1999).
33 Robert Cover. Quoted Curtis / Resnik (1987) 1728.

the law, focusing mainly on legal images from early modern through twentieth-century Europe and America. The glum faces of a family awaiting a verdict, the flailing arms of an enchained prisoner, a fainting damsel, gesticulating lawyer, sour-faced defendant, or the unflappable repose of a judge trigger visceral reactions in modern viewers: we can swiftly identify these expressions and place these feelings into familiar narratives of justice. But the selected images also illustrate some of the challenges in interpreting emotions in visual sources. Their familiarity may demonstrate the strength of visual conventions rather than the singularity of their signification. As John Berger described the experience of seeing, »We never look at just one thing; we are always looking at the relation between things and ourselves«.[34] That is, a viewer's ability to immediately identify an expression may say more about a learned visual-emotional repertoire rather than about the feelings of the observed subject.

Despite the ambiguity of emotions in images, the long history of legal images gives a basis for their interpretation. European law is an image-producing social and cultural institution whose depictions of the law go back at least as far as the medieval era, when illuminators added illustrations to legal books. Often informed by religious iconography and a minimal reading of the texts, they presented expressions through hand gestures or the positioning of heads and figures.[35] Other visual traditions, such as the legal emblem, developed in the sixteenth century, revealing both »the mode of law's opening to the social and simultaneously the medium of its transmission« as well as the enigmatic, »opaque and polysemic … expression of the juridical imaginary«.[36] Courtroom illustrations and etchings, broadsheets, and nineteenth-century journalism often relied on the placement of persons and symbols in a legal setting as well as gestures to express feeling. They not only allude to the power of space to affect feeling and its bodily representation, such images also show the limitations and possibilities of a given medium as well as an image's reproducibility. Legal portraiture and paintings demonstrate how a closer focus on the faces of jurists, defendants, and witnesses allows for the complex psychological scrutiny of emotions through facial expression. Since the late nineteenth century, photographs have served as »hard« evidence in civil and criminal trials, but legal photographs can also testify as to the emotional happenings of a courtroom trial to the curious public.

In legal images, the line between representation and documentation is always blurry. On the one hand, a photograph seems more objective than a hand-rendered picture, but it is also a product of the technology and editorial choices: at what angle and in what lighting is a subject to be captured? Which image should be published? How should the photograph be cropped or otherwise altered? On the other hand, an allegorical painting may not capture the feelings of a person in a specific time and place; nevertheless, it can evince a culture's ideals of legal feeling in all their complexity. Perhaps no image better captures the indeterminate and even contradictory meaning of a feeling better than the legal cartoon in which the expressions of lawyers, judges, jurors, witnesses, and defendants are not to be taken at face value.[37] In these images, the artistic rendering of a frown, pout, scowl, or smile with accompanying body gestures often cues the viewer to a subject's dissimulation, ignorance, theatricality, or personal vices. In the visual satire of justice, emotions often make a parody of legal practices in search of »the truth and nothing but the truth«.

How an image captures feeling is not only a matter of the maker and medium – the traditional matter of art history and visual culture studies – but of the subjects themselves. Defendants and jurists, for example, often knew or learned how to manipulate their own images to legal or political advantage both inside and beyond the court. While the news coverage of celebrity trials existed prior to mass media, the number of legal images grew exponentially after its advent. In addition, film later offered jurists and the public moving images of the law in practice: lawyers could study trials and record other legal proceedings to create evidence or for strategic purposes. The cold or hostile posturing of defendants under interrogation could make them appear more sinister, while uncontrol-

34 Berger (1972) 9.
35 See L'Engle (2001).
36 Goodrich / Hayaert (2015) 2, 5.
37 See Vidor's contribution to this Focus section.

lable weeping could make them appear surely guilty, but pitiable. Contemporary trial lawyers utilize film recordings to observe the emotional reactions of potential jurors to the questions they are posed or to specific lawyers. At the same time, televised trials and documentaries on the law and courtrooms offer the public an intimate glimpse into the practice of law and can arguably affect legal proceedings. Three recent American documentaries detail how defendants in highly publicized trials predetermined their facial expressions before entering the court.[38] And because interpersonal conflict is inherent in legal trials, legal subjects are easily adapted to fictional narratives, such as serialized television series and cinema, which offer the public models of how participants should feel in court. Now digital media also contribute to the corpus of legal images, posing new questions for jurists and legal scholars.[39]

In addition to demonstrating the role of emotions in legal systems, such images also possess the rhetorical power of feeling, persuading viewers in accordance, or in conflict, with the letter of the law. For example, lawyers debate and judges arbitrate whether the admission of visual evidence will provoke an immediate, and even unconscious, reaction so strong as to prevent a fair trial. At the same time, when admitted, trial lawyers will rely on the evocative power of such visual images to appeal to jurors' emotions. Likewise, such images can also be used by the media, advocacy groups, victims' families, or the public to demand justice or critique the justice system itself, particularly in cases involving discrimination.[40] The images featured in this Focus section also demonstrate how the visual could provoke fear, skepticism, curiosity, anger, disgust, or satisfaction with the law. They exemplify the kinds of legal images that may be analyzed in terms of emotions, despite Justice's covered eyes.

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38 See de Lestrade (2004); Jarecki (2015); Edelman (2016).

39 See Sherwin / Feingenson / Spiesel (2006).

40 See, for example, Stevenson (2014).

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